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March 19, 1990

ATTORNEY GENERAL OPINION NO. 90- 33

Terry P. Todd
Montgomery County Attorney
Courthouse
Independence, Kansas 67301

Re: Minors -- Kansas Code for Care of Children --
Filing of Petition on Referral by SRS or Other
Person; Filing by Individual -- Duties of County or
District Attorney to Represent SRS

Synopsis: The Kansas Code for the Care of Children provides that an individual or the county or district attorney may initiate a child in need of care petition. Under either statutory provision the duties of social and rehabilitation services (SRS) are investigative and/or custodial. During presentation of the case, the role of an SRS employee is that of a witness. A county or district attorney is not under a duty to represent an SRS employee during the presentation of a child in need of care case whether the case is presented by an individual or the county or district attorney. Cited herein: K.S.A. 19-702; K.S.A. 1989 Supp. 38-1502; K.S.A. 38-1503; 38-1510; K.S.A. 1989 Supp. 38-1523; 38-1524; K.S.A. 38-1529; 38-1532; 38-1541; K.S.A. 1989 Supp. 38-1542; 38-1543; 38-1546; K.S.A. 38-1551; 38-1562; K.S.A. 1989 Supp. 38-1563; 38-1565; K.S.A. 38-1566; 75-5310.

* * *

Dear Mr. Todd:

As Montgomery County Attorney you request our opinion regarding the duty of a county attorney in a private child in need of care case. Specifically, you inquire whether a county attorney is under a duty to represent the interests of the Kansas Department of Social and Rehabilitation Services (SRS) in a child in need of care case which was initiated by a petition filed by individual pursuant to K.S.A. 38-1529(b).

Initially, in the Kansas code for care of children, K.S.A. 38-1501 et seq., the duties of a county or district attorney are set out in K.S.A. 38-1510:

"It shall be the duty of the county or district attorney to prepare and file the petition alleging a child to be a child in need of care and to appear at the hearing on the petition and to present evidence that will aid the court in making an appropriate adjudication at the conclusion of the hearing. The county or district attorney shall also have the other duties required by this code."

K.S.A. 38-1510 is cross-referenced to the related section of K.S.A. 38-1529 which deals with the filing of a petition on referral by SRS or other person and filings by individuals. That statute reads:

"(a) Whenever the state department of social and rehabilitation services or any other person refers a case to the county or district attorney for the purpose of filing a petition alleging that a child is a child in need of care, the county or district attorney shall review the facts and recommendations of the department and any other evidence available and make a determination whether or not the circumstances warrant the filing of the petition.

"(b) Any individual may file a petition alleging a child is a child in need of care and the individual may be represented by the individual's own attorney in the presentation of the case."

Attorney General Opinion No. 85-26 discussed the apparent conflict between K.S.A. 38-1510 and 38-1529 by examining the legislative history:

"In reviewing the comments made by the Kansas Judicial Council in the re-write of the code in 1981, we find that the above-named statutes reincorporated K.S.A. 1980 Supp. 38-815c and 38-816 (repealed, L. 1982, ch. 182). These earlier provisions placed a duty on the county and district attorneys to present a pre-filing determination to the court, which then decided whether to proceed. The new code provisions leave that determination to the prosecutor. The 1981 Judicial Council Bulletin Comments state:

'This section replaces K.S.A. 1980 Supp. 38-816 and removes the court from the making of pre-filing determinations, except in limited circumstances covered in subsection (c) of this section. This is consistent with the policy of the Committee to maintain the impartiality of the court.

'Subsection (a) places the duty of determining whether or not a petition should be filed with the county or district attorney.

'Subsection (b) provides for the possibility of an individual filing a petition and proceeding with retained counsel.

'Subsection (c) deals with the contingency of an individual filing the petition, but requesting the county or district attorney to present the case.' (Emphasis added.) Comments to Section 1529, Judicial Council Bulletin, p. 29, 30, June, 1981.

"Although the final version is somewhat different from the proposed language, it is apparent that the intent of K.S.A. 38-1529, as well as 38-1510, was to remove the need for a court to make a pre-filing determination. See Comments, supra, p. 17.

"A general rule of statutory construction is that all the provisions in an act must be read in pari materia [Claflin v. Walsh, 212 Kan. 1 (1973)], and, if possible, construed to be consistent. Capital Services, Inc. v. Dahlinger Pontiac-Cadiallac, 232 Kan. 419 (1983). As it would be inconsistent to give an individual an opportunity to file a petition, then limit enforcement only to county and district attorneys, we can only conclude that the intent of the drafters was to place an affirmative duty on county and district attorneys to review and prosecute child abuse violations, not to make enforcement an exclusive function of prosecutors only. For further support, see In re Hamlett, 2 Kan.App.2d 642 (1978). Further, we note that code violations are civil, not criminal, in nature. K.S.A. 1984 Supp. 38-1501."

That the code contemplates two distinct and separate methods for presentation of a child in need of care case is further supported by K.S.A. 38-1532 which sets out the procedure upon filing of the petition and specifies that "upon the request of the petitioner or the county or district attorney separate or additional summons shall be issued to any interested party." (Emphasis added). Further support is found in K.S.A. 38-1555 which addresses the degree of proof required in a child in need of care case, and in which it is specified that "the petitioner or the state must prove by clear and convincing evidence that the child is a child in need of care." (Emphasis added).

We must conclude that if the county or district attorney determines that circumstances warrant the filing of a child in need of care petition pursuant to K.S.A. 38-1529(a), then K.S.A. 38-1510 specifies the duties which adhere to the county or district attorney in the presentation of the case.

However, in the exercise of his or her discretion, the county or district attorney may determine that the circumstances do not warrant the filing of a child in need of care petition. In that event an individual, with or without an attorney, may file a petition and present the case. K.S.A. 38-1529(b) also would allow an individual to bypass the county or district attorney's office and initiate a child in need of care case by the filing of a petition. As was concluded in Attorney General Opinion No. 85-26, this procedure could be utilized by the secretary of SRS or his representative, as an individual, by filing such a petition and using the agency legal staff to present the case.

Turning now to the duties and role of SRS in child in need of care cases, in matters prior to filing of the petition, it is the duty of SRS to receive and investigate reports of child abuse or neglect, to determine whether such a report is valid and whether action is required to protect the child from further abuse or neglect. K.S.A. 1989 Supp. 38-1523(a). SRS is also under a duty to refer the case to the appropriate law enforcement agency for criminal prosecution if that appears warranted and no action is required to protect the child from further abuse or neglect. K.S.A. 1989 Supp. 38-1523(a). The preliminary inquiry to be conducted by SRS includes the responsibility of taking immediate steps to protect the health and welfare of abused or neglected children, and a determination of whether to recommend to the county or district attorney that a child in need of care petition be filed. K.S.A. 1989 Supp. 38-1524. In the initial stages, it is the SRS investigation upon which the county or district attorney makes a determination whether or not the circumstances warrant a filing of the petition. K.S.A. 38-1529.

Once the petition for a child in need of care case is filed, either by a county or district attorney, or by an individual, the role of SRS is to accept placement of the child pursuant to an ex parte order of protective custody (K.S.A. 1989 Supp. 38-1542), an order of temporary custody (K.S.A. 1989 Supp. 38-1543), or an order of informal supervision [(K.S.A. 38-1544(a), K.S.A. 1989 Supp. 38-1563(d)(4))].

In the adjudicatory proceedings, K.S.A. 38-1551 through 38-1558, SRS has no statutory function. SRS employees, as well as any other persons having relevant information, may be called by the petitioner or the state as witnesses in the presentation of the case to the court.

If a child is adjudicated to be a child in need of care, the case moves to disposition, K.S.A. 38-1562, in which SRS custody is a dispositional option available to the court. K.S.A. 1989 Supp. 38-1563(d)(4). If the court exercises that option, SRS is under a duty to prepare and submit a plan for reintegration of the child back into his family or if that is not a viable alternative, for other placement of the child. K.S.A. 1989 Supp. 38-1565. Further, if the child is placed in SRS custody, a progress report must be submitted every six months by SRS, K.S.A. 1989 Supp. 38-1565, and SRS is required to give written notice to the court of any change of placement. K.S.A. 38-1566.

In summary, the code requires SRS initially to act in an investigative capacity with a duty to refer a case for either criminal prosecution and/or for the filing of a child in need of care petition by the county or district attorney. SRS is also required to function in a custodial capacity upon initial or final order of the court. SRS is not an "interested party" as defined by K.S.A. 1989 Supp. 38-1502(e) to mean "the state [as distinguished from the "secretary of SRS" in the definition section of K.S.A. 38-1502(a)], the petitioner, the child, any parent and any person found to be an interested party pursuant to K.S.A. 38-1541 and amendments thereto." The role, therefore, of SRS staff during the adjudicatory and dispositional phases of the proceedings must be that of a witness defined generally as meaning

"one who is cognizant or has knowledge of a fact; one who has personal knowledge of some fact or transaction; one who has knowledge of a fact or occurrence sufficient to testify in respect to it."
97 C.J.S. Witness § 331 (1957).

As such, the county or district attorney is not required to represent SRS anymore than the county or district attorney is required to represent any other witness.

One further issue must be discussed which again is an apparent conflict in statutes, this time between K.S.A. 19-702(a) and K.S.A. 38-1529. K.S.A. 19-702(a) sets forth the duties of a county attorney as follows:

"Except as otherwise provided in this section, it shall be the duty of the county attorney to appear in any court having jurisdiction within the county and

prosecute or defend on behalf of the people all actions and proceedings, civil or criminal, in which the state or the county is a party or interested."
(Emphasis added).

As set forth earlier, K.S.A. 38-1529(b) provides that in a child in need of care case, any individual may file a petition and present the case.

The apparent conflict between K.S.A. 38-1510 and K.S.A. 38-1529 was resolved by a review of legislative history and construing the statutes consistently and in pari materia. Claflin v. Walsh, 212 Kan. 1 (1973); Capital Service, Inc. v. Dahlinger Pontiac-Cadillac, 232 Kan. 419 (1983). As with the apparent conflict between K.S.A. 38-1510 and K.S.A. 38-1529(b), here as well it would be inconsistent to give an individual the opportunity to file a petition and present the case, and also to require the county attorney to do the same. We therefore again conclude that the county attorney has an affirmative duty to review child in need of care referrals from SRS or other persons and prosecute where circumstances warrant, and not to make prosecution of all child in need of care cases mandatory.

Further, the jurisdictional section of the Kansas code for the care of children, K.S.A. 38-1503(a), makes clear that "[p]roceedings concerning any child who appears to be a child in need of care shall be governed by this code, except in those instances when the Indian child welfare act of 1978 (25 U.S.C. §§ 1901 et seq) applies." (Emphasis added). The code, as discussed, provides alternate methods to initiate child in need of care proceedings.

A further apparent conflict between K.S.A. 19-702(a) and K.S.A. 38-1529(b) arises because the state may well be "interested" if a child is placed in a state (SRS) facility by an initial or dispositional order of the court after an individual files a child in need of care petition. Although a county attorney and SRS both serve state interests, they are separate entities and consequently their duties and obligations are not concurrent. The fact that a child is placed in a state (SRS) facility by order of the court, does not shift the responsibility for any perceived needed legal representation from SRS agency legal staff to the county attorney. SRS staff attorneys are available to represent the specific state interests of SRS. K.S.A. 75-5310. Additionally, the requirement of K.S.A. 19-702(a) is for a

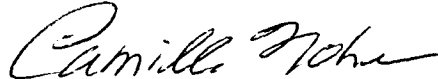
county attorney to "prosecute or defend." If the county attorney determines that circumstances do not warrant the filing of a petition, K.S.A. 38-1529(a), the interest of state, as the term is used in that statute, is concluded.

In conclusion, we are of the opinion that the Kansas Code for the Care of Children provides that an individual or the county or district attorney may initiate a child in need of care petition. Under either statutory provision the duties of social and rehabilitation services (SRS) are investigative and/or custodial. During presentation of the case, the role of an SRS employee is that of a witness. A county or district attorney is not under a duty to represent an SRS employee during the presentation of a child in need of care case whether the case is presented by an individual or the county or district attorney.

Very truly yours,



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